

(2004) 03 BOM CK 0088

In the Bombay High Court

Case No : Arbitration Petition No. 541 of 2003

Environmental Engineer Inc.

APPELLANT

Vs

Maharashtra Pollution Control Board and Another

RESPONDENT

Date of Decision : 16-03-2004

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2004) 3 ALLMR 45 : (2004) 2 ARBLR 503 : (2004) 2 CivCC 569 :
(2004) 3 MhLj 37

Hon'ble Judges : S.U. Kamdar, J

Bench : Single Bench

Advocate : S.J. Bhandari, instructed by Bhandari and Bhandari, for the Appellant; R.S. Desai, for the Respondent

Final Decision : Dismissed

Judgement

S.U. Kamdar, J.—By the present petition the petitioners are challenging the arbitral award dated 25-7-2003 passed by the Arbitrator u/s 34 of the Arbitration and Conciliation Act, 1996.

2. Some of the material facts of the case are as under :--

The respondent No. 1 Maharashtra Pollution Control Board invited tenders for the establishment of regional Laboratories at Nagpur and Pune. The petitioner submitted his tender and after negotiations, the same was accepted on 27-4-1994. On 7-5-1994, the respondent issued the acceptance letter. A work order was issued and ultimately the work was carried out and completed by the petitioner. However, in respect of the said work, differences and disputes arose by and between the parties. The petitioner therefore invoked the arbitration agreement between the parties under the tender document. The respondent did not appoint an arbitrator and accordingly the petitioner filed an application u/s 11 of the Arbitration and Conciliation Act, 1996 being Arbitration Application No. 34 of 2001. By an order dated 28-7-2001, the learned Judge exercising power u/

s 11 of the Arbitration and Conciliation Act, 1996 directed that the matter be referred to arbitration of one Mr. Sitesh Goswamy. In the course of deciding the said application u/s 11, one of the issues raised was that the claims were barred by law of limitation. It was urged that because the petitioner herein did not request for an arbitrator within 90 days from the submission of the final bill, the matter could not be referred for arbitration. While deciding this aspect of the matter, the learned Judge, inter alia, observed that the bill dated 21-3-1995 was not the final bill as there were later bills submitted on 31-5-1995. On this basis the learned Judge held that the claims were not barred by law of limitation.

3. The matter thereafter proceeded before the arbitrator and the arbitrator while considering all the aspects of the matter, has passed the impugned award dated 25-7-2003.

4. According to the petitioner, the Arbitrator did not consider one of the claims which was referred to him. The learned counsel has pointed out that the Arbitrator has in his award set out the claims in para 5 thereof. He pointed out that though Arbitrator referred to the claim of interest on outstanding amount in para 5 (g) of the said Award still while passing the final award the Arbitrator has ignored the said claim of the petitioner and has not decided the same. Therefore, the petitioner made an application for rectification of the award. The learned Arbitrator by his communication dated 20-9-2003 has clarified that the interest has already been taken into account while considering the claims under paragraph 5(a) to 5(f) of the award dated 25-7-2003 and further clarified that in respect of interest on the outstanding payment the same has not been granted by the Arbitrator and, therefore, the award remained unchanged.

5. The learned Counsel appearing before me for the petitioner has raised two grounds to challenge the award. The first ground raised before me by the learned Counsel for the petitioner is that while deciding the matter the learned Arbitrator has framed the issues in paragraph 5 of the Award however the Arbitrator has dealt with only those issues set out in paragraph 5(a) to 5(f) of the Award. The Arbitrator has totally ignored or has not dealt with the dispute arising under paragraph 5 (g) of the said award. It has been contended before me by the learned Counsel for the petitioner that the Arbitrator was duty bound to consider each and every claim which were referred to him for the adjudication. It was further contended before me by the learned Counsel for the petitioner that in any event so far as claim 5(g) is concerned, the Arbitrator has given no reasons for refusing to grant the said claim. The second contention raised before me by the learned counsel for the petitioner pertains to the conduct on the part of the Arbitrator. It has been contended that the Arbitrator behind the back of the petitioner visited the office of the respondent and has inspected the measurement book and/or final bill and has on the basis of such inspection passed an award giving no opportunity to the petitioner to deal with the same. Reliance is placed in respect of this contention on the pleadings made in paragraph 6 of the petition in which it is inter alia stated by the petitioner that

though the arbitrator issued a letter dated 3-6-2003 to both the parties fixing the meeting at the office of the respondent for scrutiny of measurement book/final bill on 11-6-2003. However, it was not possible for the petitioner to attend the said meeting because the said letter dated 3-6-2003 was received by the petitioner only on 11-6-2003 i.e. the day on which the said meeting was fixed. Therefore, the learned Arbitrator has committed breach of principles of natural justice and, thus, the said award dated 25-7-2003 is liable to be quashed and set aside.

6. While dealing with the first contention, I find that in respect of the claim No. 5 (a) to 5(f) which are set out in paragraph 5 of the Award, the learned Arbitrator has considered all the claims set out therein and in fact has also granted interest in the Award. In paragraph 7 of the Award the learned Arbitrator has stated as under:--

"Details of the compensations including interests (admissible in favour of EEI-Nagpur) wherever applicable, to be in compliance with this award, is appended per page-8.)"

The said page 8 which is also a part of the Award sets out the details pertaining to computation of interest claimed and granted. A perusal of the said page 8 of the award indicates that not only the claims 5(a) to 5(f) were considered, but it also set out interest and the quantum of interest and the period of interest. The interest column indicates that interest is granted by the Arbitrator in respect of claims from the year 1995 or from the year 1996 right upto 8-11-2002. Thus, in respect of each of the said claims set out in paragraph 5(a) to 5(f) the learned Arbitrator has considered the interest and has granted the interest. However, the learned counsel for the petitioner contends that the grant of interest by the Arbitrator on page 8 is independent and different than what is set out as a claim in Clause 5(g). The petitioner has filed further affidavit on 8-2-2004 and both the counsel appearing for both the sides have stated before me that this affidavit was filed to explain claim of interest pursuant to the oral directions given by the Court on earlier occasions. On perusal of the said affidavit dated 8-2-2001 and particularly Annexure-I, thereto, I find that the claim of interest under Clause 5(g) of Rs. 19,72,672.24 is based on the interest claim in respect of various claims set out under 5(a) to 5(f). The detailed calculation of interest amount as set out in Annexure-1 to the affidavit of the petitioner dated 8-2-2004 makes the said aspect very clear. The learned counsel for the petitioner has relied upon this statement to show that the interest amount is not independent to claims set out in 5(a) to 5(f). However, the statement itself in its particulars indicates that the claims are in respect of claims set out under 5(a) to 5(f) and the interest is calculated for different period upto 31-1-2002 on the said claims. In my view, a perusal of the Annexure-1 to the further affidavit dated 8-2-2004 clearly demonstrates that the interest granted by the learned Arbitrator is in respect of the claim 5(a) to 5(f) and the claim of interest under Clause 5(g) is not any independent claim de hors the claim 5(a) to 5(f) made before the Arbitrator.

7. In any view of the matter, it is not a case that the learned Arbitrator has ignored or not taken into consideration the claim 5(g) as agitated before me by the learned counsel for the petitioner. Once the conclusion is arrived at that the learned Arbitrator has considered all the claims including the claim of interest under paragraph 5(g) as set out in the award, it is not open to this Court to go into the quantum of interest or the period of interest because that is an issue which is solely within the jurisdiction of the Arbitrator to decide and grant the same. I cannot go into the quantum or period of interest claimed and/or awarded by the Arbitrator. In the light of the aforesaid, I am of the view that the first contention raised by the petitioner has no merit and, accordingly requires to be rejected.

8. Insofar as the second contention is concerned, it is true that the letter dated 3-6-2003 was addressed by the Arbitrator to both the parties before carrying out scrutiny of measurement book and/or final bill on 11-6-2003. It has been the case of the petitioner that the said letter is received on 11-6-2003. However, the letter dated 11-6-2003 addressed by the petitioner to the learned Arbitrator which is Exhibit "E" at page 32 of the petition, does not make any such grievance at all. Admittedly, the said letter dated 11-6-2003 does not even protest to such scrutiny undertaken by the Arbitrator, but requests the Arbitrator to carry out the said scrutiny and let the petitioner know about the findings after the visit to the office of the respondent No. 1 and if necessary the petitioner can clarify the stand in that behalf. Thus, the objections which are set out in paragraph 6 of the petition is an afterthought. Thus, the learned Arbitrator has committed no error in carrying out the scrutiny of final measurement book for the purpose of deciding the dispute on merits and that also after giving notice to both the parties in accordance with the notice dated 3-6-2003. Thus, the contention of the petitioner that there has been a breach of the principles of natural justice because the Arbitrator has undertaken the visit behind the back of the petitioner has no merit and the same is accordingly rejected. Furthermore, it is the petitioners themselves by their letter dated 11-6-2003 in fact emphasized to, the said visit and they have made no protest about the same. The respondents have filed their affidavit in reply on 29-1-2004 to this petition. The respondents in their affidavit in reply in paragraph 6 have stated that on 11-6-2003 the learned Arbitrator visited the office and inspected the measurement books which had been duly signed and endorsed by the petitioner and no other inspection was done of the records. It has been further pointed out that in fact Xerox copy of the measurement book was supplied to the petitioner during the course of hearing before the Arbitrator. In my view, it is open to the Arbitrator to carry out inspection of any record after due notice to both the parties which the learned Arbitrator has done and, therefore, even insofar as the second contention is concerned, there is no merit. I further find that the contention of the conduct of the Arbitrator to carry out inspection behind the back of the petitioner is erroneous and incorrect. I find that the learned Arbitrator has given notice to both the parties. If in reply to the notice dated 3-6-2003 the petitioner would

have protested, the Arbitrator could have refixed the meeting or visit. However, the petitioner did not do so and the petitioner accepted that the inspection can be carried out in accordance with notice dated 3-6-2003. In view thereof, in my view, the petitioner's are not entitled to agitate the said issue otherwise also. The petitioner has failed to show any prejudice caused to the petitioner in pursuant to the said inspection of the measurement book and, therefore, the said contention cannot be entertained.

9. In view of the fact that no other grounds of challenge are raised before me, I find that there is no merit in the petition and the petition is accordingly dismissed. No order as to costs.

Parties to act on ordinary copy of this order duly authenticated by the Private Secretary of this Court.